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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 260.

FRANK B. ANDRUS, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED APRIL 27, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 5, 1888.

1 *Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.*

Be it remembered that heretofore and on, to wit, the 26th day of March, A. D. 1885, came Frank B. Andrus, by T. A. Green, Esq., his attorney, and filed in said court his complaint and sued out of said court a writ of summons against The St. Louis Smelting and Refining Company; and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA:

In the United States Circuit Court for the District of Colorado.

FRANK B. ANDRUS, Plaintiff,

v.

THE ST. LOUIS SMELTING AND REFINING COMPANY, Defendant.

Action on the case.

The said plaintiff, Frank B. Andrus, states that he is a citizen of the State of Colorado, and that the said St. Louis Smelting and Refining Company is a corporation duly incorporated under the laws of the State of Missouri and is a citizen of the said State of Missouri.

Plaintiff further states that said defendant company did,
2 on, to wit, the 27th day of March, A. D. 1878, for and in consideration of the sum of eight hundred and seventy-five (875) dollars, in hand paid by plaintiff to defendant company, sell and convey to plaintiff, by good and sufficient warranty deed in the usual form of such deeds, the following mentioned and described lot and parcel of ground, situate, lying, and being in the county of Lake and State of Colorado, and more particularly described, to wit:

Lot number six (6), in block number two (2), as the same appears upon the map and plat of the grounds of the St. Louis Smelting and Refining Company, situate in the town of Leadville, county and State aforesaid.

Plaintiff states that all of the statements, recitals, and provisions of said deed are true as therein set forth, and that said deed and conveyance, with all of its covenants, terms, and conditions, receipt, amounts of money, date and time of filing and recording, are substantially in the words and figures following, to wit:

This deed, made this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and seventy-nine, between the St. Louis Smelting and Refining Company, by Charles I. Thompson, its attorney-in-fact, of the county of Lake and State of Colorado, of the first part, and Frank B. Andrus, Jr., of the county of Lake and State of Colorado, of the second part—

3 Witnesseth: That the said party of the first part, for and in consideration of the sum of eight hundred and seventy-

five (875.00) dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever all the following-described lot or parcel of land, situate, lying, and being in the county of Lake and State of Colorado, to wit:

Lot numbered six (6), in block numbered two (two), as the same appears upon the map and plat of the grounds of the St. Louis Smelting and Refining Company, situate in the town of Leadville, in the county and State aforesaid, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said Saint Louis Smelting and Refining Company, party of the first part, for itself, successors, heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at
4 the time of the ensealing and delivery of these presents it is well seized of the premises above conveyed, as of good, sure, perfect, absolute, and indefeasible estate of inheritance in law, in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever, and the above-bargained premises in quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof the said party of the first part has hereunto set its hand and seal the day and year above written, by Charles I. Thompson, its attorney-in-fact, who is thereunto directed by its duly authorized agent.

THE ST. LOUIS SMELTING AND
REFINING COMPANY, [SEAL.]
By CHARLES I. THOMPSON, [SEAL.]
Its Attorney-in-Fact.

Signed, sealed, & delivered in presence of—

——— ———.

STATE OF COLORADO, } ss:
Lake County, }

I, Daniel Sayer, a notary public in and for said county, in the State aforesaid, do hereby certify that Charles I. Thompson, the attorney-in-fact of St. Louis Smelting and Refining Company, personally known to me to be the person who subscribed the name of the St. Louis Smelting and Refining Company to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act and as the free and voluntary act of said St. Louis Smelting and Refining Company for the uses and purposes therein set forth.

Given under my hand and notarial seal this 27th day of March, A. D. 1879.

[NOTARIAL SEAL.] (S'g'd) DANIEL SAYER,
Notary Public.

Upon which deed there appears the following endorsement:

No. 1875. Warranty deed. The St. Louis Smelting and Refining Company to Frank B. Andrus, Jr.

STATE OF COLORADO, } ss:
Lake County, }

I hereby certify that this instrument was filed for record in my office at 11 o'clock a. m. April 7, 1879, and is duly recorded in Book 13, page No. 286.

(S'g'd) JOS. H. WELLS, *Recorder.*

Plaintiff states that, amongst other covenants, said deed contains the covenant of quiet possession, whereby defendant company covenants with plaintiff, his heirs and assigns, that he or they shall have the quiet and peaceable possession of said lot and premises as against the whole world, as shown by the copy of said deed set out in full as above.

6 Plaintiff states that before he purchased said lot and piece of ground the defendant company, by and through its duly elected officers and duly appointed and authorized agents and attorneys, urged and importuned plaintiff to purchase the same, and plaintiff wholly refused to do so unless defendant company could deliver to plaintiff the immediate possession of the same; that plaintiff then and there informed the said officers, agents, and attorneys of def't company that he would not under any circumstances or at any price purchase said lot and premises unless defendant company could and would deliver plaintiff the immediate possession of the same; that at that time the population of the said town of Leadville was increasing very rapidly and rents were very high, and that it was almost impossible to rent a business house in said town at any price, and plaintiff wanted said lot and premises for his own use and occupancy and for the purpose of carrying on his own business.

That before said plaintiff would agree to buy or purchase said lot and premises and while negotiations were going on between plaintiff and defendant company for the same the officers, agents, and attorneys of defendant for and in behalf of said defendant company falsely, fraudulently, and knowingly and intentionally represented to plaintiff that defendant company had secured the actual possession of said lot and premises, and that defendant company had obtained a release from all other parties who claimed or pretended to claim (the actual possession of) the right to the actual possession of said lot and premises, and that defendant company would make and execute to plaintiff a good and sufficient warranty deed con-
7 taining all of the usual covenants, together with a covenant of quiet and peaceable possession of said lot and premises; and then and there assured plaintiff that if he would purchase and pay for said lot and premises and accept a warranty deed for the same, defendant company could and would deliver to plaintiff the immediate and actual possession of said lot and premises.

That at that time there was a great rush of people to the said town of Leadville on account of rich mineral discoveries in the immediate neighborhood of said town, and that there was a great struggle to secure the possession of lots and business houses in the same, and many conflicting titles and claims to the right of possession of houses and lots, and much confusion, riots, and even bloodshed in regard to possession of lots and houses and lots in said town, and that amid the general confusion and struggle aforesaid and many contradictory and conflicting claims to the actual possession of lots and houses in said town plaintiff was wholly unable, after making all the inquiry and using all the diligence within his power, to find out whether the said false and fraudulent statements of defendant company and its officers, agents, and attorneys as aforesaid were true or false, and that plaintiff wholly failed to do so, and plaintiff had no means of finding out or knowing the same, and that there were no records in said county of the lots in said town showing in any manner who was the owner of lots in the same and entitled to the possession of the same, and that plaintiff was compelled to rely wholly upon the said statements and assurances of def't company as aforesaid, and that plaintiff did wholly rely on such statements and assurances and at that time believed the same to
8 be true and honest and made in good faith, and that, believing statements and assurances and relying on the good faith of the said officers, agents, and attorneys of defendant company, the said plaintiff purchased said lot and premises, and then and there paid down the money for the same to defendant company, to wit, the sum of $875, and accepted the said warranty deed from defendant company for the same as aforesaid.

That before and at the time plaintiff purchased and paid for said lot and premises defendant company represented to plaintiff that it had just received a patent from the Government of the United States for said lot and premises, as well as for a large number of lots in said town, and that no opposition would be made to its claim and its right of possession to said lot and premises, and that no trouble

whatever of any kind would thereafter occur in regard to either title or the actual possession of said lot and premises, but plaintiff states that all of said statements and assurances on the part of defendant company in regard to its being able to put plaintiff into the immediate actual possession of said lot and premises, and all of said statements that defendant company had obtained a release from all parties who claimed adverse titles and an adverse right to the actual possession of said lot and premises, and all statements and assurances on the part of defendant company as aforesaid that it could and would put plaintiff into the immediate possession of said lot and premises, were wholly and absolutely false and fraudulent and known to be wholly false and fraudulent by defendant and its officers, agents, and attorneys at the time they made the same as aforesaid, and plaintiff states that said false and fraudulent statements were made by C. I. Thompson and A. P. Hereford, who were the duly retained and employed attorneys of defendant company, to secure titles to said lot and premises and possession of the same and to secure title of possession of other lots in said town for defendant, and also by the president, —— Harrison, and the vice-president and secretary of defendant company, all of whom were duly authorized to sell said lot and premises, as well as other lots and premises claimed to be owned by defendant company in said town of Leadville; and plaintiff states that said agents, attorneys, and officers, for and in behalf of said defendant company, conspired and colluded together to deceive, defraud, and wrong and injure plaintiff by inducing him to pay said company the sum of $875 in money and purchasing said lot and premises as aforesaid, knowing at the same time that defendant company could not put plaintiff in possession of the same, and that one Sarah Ray, whom plaintiff did not at that time know, and had not heard of either the said Sarah Ray or her claim to said lot and premises and had no means of finding out the same, did claim to be the owner of said lot and premises and entitled to the possession of the same; that all of said agents, attorneys, and officers of said company well knew at the time they induced plaintiff to purchase said lot that one Sarah Ray claimed to be the owner of and entitled to the possession of said lot and premises, and well knew that defendant Co. had not obtained a release or in any manner obtained the right to either the title or possession of the said Sarah Ray to the same, and wilfully, fraudulently, and falsely then and there misrepresented to plaintiff that defendant Co. had obtained a release of all such claims from every one making the same; and plaintiff states that said defendant company, by its said officers, also wilfully and intentionally suppressed and denied the truth of this matter to plaintiff to mislead and deceive plaintiff into the purchase of said lot and premises as aforesaid, and plaintiff states that he would not have purchased said lot and premises had it not been for such false and fraudulent statements and suppression of the truth as aforesaid.

Plaintiff further states that, the more effectually to deceive him and induce him to purchase said lot and premises, the defendant

company, by its agents, officers, and attorneys as aforesaid, offered to put in and did put in said deed a covenant of quiet and peaceable possession, when defendant company well knew that it could not comply with the same, and that defendant company falsely and fraudulently offered to put said covenant in said deed and did put the same in said deed knowing at the time that the same was a mere sham and fraud, and that the same was put in to defraud and mislead plaintiff and induce him to purchase said lot and premises and pay for the same as aforesaid, and plaintiff states that the putting of said covenant of quiet and peaceable possession and enjoyment did, in connection with the false and fraudulent statements aforesaid, induce him to purchase said lot and premises.

Plaintiff states that when he had purchased said lot and premises, as above stated, and attempted to take possession of the same *that* he found the said Sarah Ray had seized the actual possession of said lot and premises and was holding the same under an adverse title to defendant company and claiming the same by virtue of prior possession and occupation on the public domain of the United States and under a town-site right in said public domain, and who wholly refused to give up such right and possession to defendant company or to plaintiff; and plaintiff states that defendant company well knew, before and at the time it induced plaintiff to purchase
11 said lot and premises as aforesaid, that said def't Co. could not put plaintiff in possession of said lot and premises, and said company well knew, by and through its agents, officers, and attorneys before and at the time it induced plaintiff to purchase said lot and premises as aforesaid, that said Sarah Ray did claim to own said lot and premises, and that the records of said county furnished no evidence of such claim and adverse title, and that plaintiff was wholly and absolutely ignorant of such claim and had no means of finding out the same, and fraudulently concealed and denied to plaintiff that such claim existed, and assured plaintiff that defendant company had obtained a release of all such claims no matter by whom held, and well knew that plaintiff would not have purchased said lot and premises had he known of said adverse claim.

That soon after plaintiff had been induced as aforesaid to make said purchase the defendant company commenced a suit in ejectment against the said Sarah Ray to recover possession of said lot and premises, but did not succeed in ejecting the said Sarah Ray and her tenants from the possession of said lot and premises until the 22d day of February, A. D. 1883, and plaintiff was kept out of possession of said lot and premises all the time from the 27 day of March, A. D. 1879, the date of his said purchase and deed above set out, till the 22 day of February, A. D. 1883; that the price or value of said lot and premises increased rapidly and immediately after plaintiff purchased the same, and that said lot and premises rented for and was worth $400 per month rental during all of said time, and that plaintiff was kept out of the same, and the aggregate
12 rental value of the same during that time was eighteen (18) thousand seven hundred and thirty-three (18,733) dollars, all of which plaintiff lost by the fraud and deceit practiced upon him

by def't company as aforesaid, together with the interest on the same up to this time.

Plaintiff states that he has been injured and damaged in the sum of twenty thousand (20,000) dollars by the wrong, fraud, and deceit of defendant company as aforesaid.

Plaintiff states that the amount involved in this action, exclusive of costs of suit, is for over the sum of five hundred dollars.

Plaintiff therefore asks judgment against def't company for the sum of twenty thousand dollars and costs of suit, and such other relief as may — legal and just.

(S'g'd) T. A. GREEN,
Att'y for Plaintiff.

(Endorsed :) 1708. Frank B. Andrus *v.* The St. Louis Smelting and Refining Co. Complaint. Filed Mar. 26, 1885. (S'g'd) Edward F. Bishop, clerk. T. A. Green, att'y for plaintiff.

And the said summons is in words and figures as follows, to wit :

Summons.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, } ss :
13 *District of Colorado,* }

FRANK B. ANDRUS, Plaintiff,
versus
THE ST. LOUIS SMELTING AND REFINING COMPANY, Defendant.

Complaint filed in the clerk's office this 26th day of March, A. D. 1885.

The President of the United States of America to the St. Louis Smelting and Refining Company, Greeting:

You are hereby notified that an action has been brought in said court by Frank B. Andrus, plaintiff, against you as defendant, to recover the sum of $20,000, due from you, the said defendant, to the said plaintiff for damages sustained by reason of the fraudulent and deceitful representations made by the said defendant in selling and conveying to the said plaintiff lot 6, block 2, in said defendant's addition to the town of Leadville, by deed bearing date the 27th day of March, A. D. 1879, as more fully set forth and described in the complaint filed herein, and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default,
according to the prayer of the said complaint, and will apply
14 to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 26th day of March, A. D. 1885, and of the Independence of the United States the 109th year.

[Seal U. S. Cir. C't, Colorado.]

(S'g'd) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, *May 2nd, A. D.* 1885.

I hereby certify that I received the within writ on the 26th day of March, A. D. 1885.

This writ, therefore, returned unexecuted, as the law directs, this 2nd day of May, A. D. 1885, per orders of plaintiff's attorney.

(S'g'd) WALTER A. SMITH, *Marshal*,
By SIM. W. CANTRIL,
Deputy Marshal.

(Endorsed:) Gen. No. 1708. Circuit court of the United States for the district of Colorado. Frank B. Andrus, plaintiff, *versus* The St. Louis Smelting and Refining Company, defendant. Summons. Filed this 2nd day of May, A. D. 1885. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. T. A. Green, attorney for plaintiff.

And afterwards and on, to wit, the 8th day of April, A. D. 1885, came the said defendant, by Chas. E. Gast, Esq., its attorney, and filed in said court and in said cause its demurrer to the complaint heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer.

UNITED STATES OF AMERICA, ss:

In the Circuit Court of the United States for the District of Colorado.

FRANK B. ANDRUS, Plaintiff,
vs.
THE ST. LOUIS SMELTING AND REFINING COMPANY, Defendant.

Now comes the said defendant, The St. Louis Smelting and Refining Company, by Chas. E. Gast, its attorney, and demurs to the complaint herein because—

1. Said complaint does not set forth facts sufficient to constitute a cause of action.

2. Several pretended causes of action have been improperly united therein, to wit:

a. A pretended cause of action for breach of a parol contract
16 to put the plaintiff in possession of the land described.

b. For breach of the covenant of quiet enjoyment contained in the plaintiff's deed.

c. For deceit.

And these several causes of action have been improperly blended in one statement.

3. That the complaint is ambiguous, unintelligible, and uncertain in this, that it does not appear how the plaintiff was misled or deceived by the pretended representations stated in the said complaint.

(S'g'd) CHAS. E. GAST,
Attorney for Defendant, The St. Louis Smelting and Refining Company, Pueblo, Colo.

(Endorsed:) 1708. United States circuit court, district of Colorado. Frank B. Andrus, pl'ff, *vs.* The St. Louis Smelting and Refining Company, def't. Demurrer to complaint. Filed Apr. 8, 1885. (S'g'd) Edward F. Bishop, clerk. Chas. E. Gast, Pueblo, Colo., att'y for def't.

And afterwards and on, to wit, the 20th day of May, A. D. 1885, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its substitute for the demurrer now on file, and the said substituted demurrer is in words and figures as follows, to wit:

17 *Substituted Demurrer.*

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court.

FRANK B. ANDRUS, Plaintiff,
vs.
THE ST. LOUIS SMELTING AND REFINING COMPANY, Defendant.

Action on the case.

Now comes the said defendant, by Charles E. Gast, its attorney, and files the following demurrer as a substitute for the demurrer now on file, and alleges—

1st. That the said complaint does not state facts sufficient to constitute a cause of action.

2nd. That the complaint is ambiguous, unintelligible, and uncertain in this—

a. It does not appear by any direct averment of the said complaint that the plaintiff made any inquiry whatever or used any diligence to ascertain whether the defendant company was in the actual possession of the property described.

b. It does not appear how the plaintiff was misled or deceived by the pretended representations stated in the complaint.

c. It is unintelligible how the pretended representations of
18 the defendant company that it had just received a patent from the Government of the United States for the said lot and that it would execute to him a warranty deed and place the plaintiff in possession thereunder tended to deceive the said plaintiff.

d. It is unintelligible how the fact of the company's deed to the plaintiff containing covenants of warranty was intended or operated to defraud or mislead him.

e. It is uncertain from anything appearing in the said complaint whether the said Sarah Ray was in actual adverse possession of the property at the time the representations aforesaid were made and the deed executed or whether she entered into possession subsequently.

(S'g'd) CHAS. E. GAST,
Att'y for Def't.

(Endorsed:) 1708. United States circuit court, district of Colorado. Frank B. Andrus *vs.* The St. Louis Smelting and Refining Company. Substituted demurrer. Filed May 20th, 1885. (S'g'd) Edward F. Bishop, clerk. Chas. E. Gast, Pueblo, Colo., att'y for def't company.

And afterwards and on, to wit, the 10th day of June, A. D. 1885, the same being one of the regular juridical days of the May term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Demurrer Sustained. Cause Dismissed at Cost of Plaintiff.

19 FRANK B. ANDRUS
vs.
THE ST. LOUIS SMELTING AND REFINING COMPANY. } 1708.

Action for damages.

At this day comes the said plaintiff, by T. A. Green, Esq., his attorney, and the said defendant, by C. E. Gast., Esq., its attorney, also comes.

And the demurrer of the said defendant to the complaint herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said complaint and the matters and things therein alleged is not sufficient in law for the said defendant to answer unto, and so the said demurrer is sustained.

And thereupon the said plaintiff here in open court saith that he doth and will abide by his said complaint.

Wherefore it is considered by the court that this cause be dismissed; that the said defendant go hence hereof without day and have and recover of and from the said plaintiff its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

20 And afterwards and on, to wit, the 22nd day of September, A. D. 1885, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his assignment of errors; and the said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA:

In the Supreme Court of the United States. Oct. Term, A. D. 1885.

FRANK B. ANDRUS, Plaintiff in Error,

v.

THE ST. LOUIS SMELTING AND REFINING COMPANY, Defendant in Error.

And now the said plaintiff in error comes and says that in the record and proceedings aforesaid there are manifest errors as follows, to wit:

1. The court below erred in sustaining the defendant's demurrer to the plaintiff's complaint.
2. The court below erred in not overruling defendant's demurrer to plaintiff's complaint.
3. The court below erred in giving judgment for defendant on said demurrer.
4. The court below erred in not giving judgment for plaintiff on said demurrer.

21 Wherefore plaintiff in error prays that said judgment may be reversed, annulled, and held for nothing, and that plaintiff in error may be restored to all things he has lost by reason thereof.

(S'g'd) T. A. GREEN,
Attorney for Plaintiff in Error.

(Endorsed:) 1708. Frank B. Andrus *v.* The St. Louis Smelting and Refining Co. Assignment of errors. Filed Sep. 22, 1885. (S'g'd) Edward F. Bishop, clerk. T. A. Green, att'y for plaintiff in error.

And heretofore and on, to wit, the 9th day of September, A. D. 1885, came again the said plaintiff, by his attorney aforesaid,
22 and filed in said court and in said cause his bond and sued out of said court a writ of error and citation to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, Frank B. Andrus, Jr., as principal and ——— ———, as surety, are held and firmly bound unto The St. Louis Smelting and Refining Company in the full and just sum of nine hundred dollars, to be paid to the said St. Louis Smelting and Refining Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of August, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at the May term, A. D. 1885, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Frank B. Andrus, Jr., and The St. Louis Smelting and Refining Company, defendant, judgment was rendered against the said Frank B. Andrus, Jr., and he having obtained a writ of error to reverse s'd judgment and a citation directed to the said St. Louis Smelting and Refining Company citing and admonishing it to be and appear at a term of the Supreme Court of the United States to be held at Washington on the 13th day of October next:

Now, the condition of the above obligation is such that if the said Frank B. Andrus, Jr., shall prosecute said writ of error to
23 effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) FRANK B. ANDRUS. [SEAL.]
L. L. WOODRUFF. [SEAL.]
J. H. MILLER. [SEAL.]

Approved.
(S'g'd) MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

Frank B. Andrus, Jr., and L. L. Woodruff & J. H. Miller, sureties on the within bond, being each first duly sworn, deposes and says that he is worth in property the sum below set opposite his name—that is to say:

As to Frank B. Andrus, Jr., three hundred dollars;
As to L. L. Woodruff " " dollars;
As to J. H. Miller " " dollars,
over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

(S'g'd) FRANK B. ANDRUS, JR.
[SEAL.] L. L. WOODRUFF.
J. H. MILLER.

Subscribed and sworn to before me, at Leadville, this 22nd day of August, A. D. 1885.

(S'g'd) J. H. PLAYTER, *Clerk*,
By GEO. P. BROWN,
Deputy Clerk.

(Endorsed:) Gen. No. 1708. Circuit court of the United
24 States, district of Colorado. Frank B. Andrus *vs.* The St. Louis Smelting and Refining Co. Bond, $300.00. Filed this 9th day of Sept., A. D. 1885. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

25 *Writ of Error.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Frank B. Andrus and the St. Louis Smelting & Refining Company, a manifest error hath happened, to the great damage of the said Frank B. Andrus, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of September, in the year of our Lord one thousand eight hundred and eighty five, and of the Independence of the United States the 110th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

25½ [Endorsed:] Gen. No., 1708. Circuit court of the United States. Frank B. Andrus, Jr, *vs.* The St. plaintiff in error, Louis Smelting and Refining Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 9th day of Sept., A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. T. A. Green, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States at Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 22d day of September, A. D. 1885.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*
By F. W. TUPPER, *Deputy Clerk.*

26 *Citation.*

27 THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to The St. Louis Smelting and Refining Company, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington city on 2d Monday, the 12th day of Oct. next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Frank B. Andrus — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 7th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

MOSES HALLETT, *Judge.*

28 [Endorsed:] Gen. No., 1708. Circuit court of the United States, district of Colorado. Frank B. Andrus, plaintiff in error, *vs.* The St. Louis Smelting and Refining Co., defendant in error. Citation. Filed in circuit court of the U. S. this 22d day of Sept., A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. T. A. Green, attorney for plaintiff in error.

Service of the within citation by true copy is hereby acknowledged this 10th day of September, A. D. 1885, and all matters of time as to service of citation are hereby waived.

CHAS. E. GAST,
Att'y for Defendant in Error.

29 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein Frank B. Andrus, Jr., was plaintiff and The St. Louis Smelting and Refining Company was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 22nd day of September, A. D. 1885.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Transcript paid, 6.95.

Endorsed on cover: Colorado C. C. U. S. No. 260. Frank B. Andrus, plaintiff in error, *vs.* The St. Louis Smelting and Refining Company. Filed April 27, 1886.

Office Supreme Court U. S.
FILED.
APR 17 1889
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT

OF THE

United States of America.

OCTOBER TERM, A. D. 1885.

FRANK B. ANDRUS,

vs.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

Statement, Brief and Argument of the Attorney for Plaintiff in Error.

T. A. GREEN,
Attorney for Plaintiff in Error.

WHIPPLE & PIERSON, PRINTERS, DENVER

IN THE

SUPREME COURT

OF THE

United States of America.

OCTOBER TERM, A. D. 1885.

FRANK B. ANDRUS,

vs.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

Statement, Brief and Argument of the Attorney for Plaintiff in Error.

1. STATEMENT OF FACTS.

The most concise statement of the facts that I can make, is to set out the complaint in full, together with the demurrer to the same.

COMPLAINT.

United States of America:

In the United States Circuit Court for the District of Colorado.

FRANK B. ANDRUS, *Plaintiff,*
vs.
THE ST. LOUIS SMELTING AND REFINING COMPANY, *Defendant.*

Complaint—Action in the Case.

The said plaintiff, Frank B. Andrus, states that he is a citizen of the State of Colorado, and that the said St. Louis Smelting and Refining Company, is a corporation duly incorporated under the laws of the State of Missouri, and is a citizen of the said State of Missouri.

Plaintiff further states that said defendant company did on, to wit, the 27th day of March, A. D. 1879, for and in consideration of the sum of eight hundred and seventy-five (875) dollars in hand paid by plaintiff to defendant company, sell and convey to plaintiff by good and sufficient warranty deed, in the usual form of such deeds, the following mentioned and described lot and parcel of ground situate, lying and being in the county of Lake and State of Colorado, and more particularly described, to wit:

Lot number six (6), in block number two (2), as the same appears upon the map and plat of the grounds of the St. Louis Smelting and Refining Company, situate in the town of Leadville, county and State aforesaid.

Plaintiff states that all of the statements, recitals and provisions of said deed are true as therein set forth, and that said deed and conveyance, with all of its covenants, terms and conditions, receipt, amounts of money, date and time of filing and recording, are substantially in the words and figures following, to wit:

"*This Deed*, made this 27th day of March, in the year of our Lord one thousand eight hundred and seventy-nine, between the St. Louis Smelting and Refining Company, by Charles I. Thompson, its attorney in fact, of the county of Lake and State of Colorado, of the first part, and Frank B. Andrus, Jr., of the county of Lake and State of Colo- of the second part—

"*Witnesseth*, That the said party of the first part, for and in consideration of the sum of eight hundred and seventy-five (875.00-100) dollars, to the said party of the first part in hand paid by the party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land, situate, lying and being in the county of Lake and State of Colorado, to wit:

"Lot numbered six (6) in block numbered two (2), as the same appears upon the map and plat of the grounds of the St. Louis Smelting and Refining Company, situate in the town of Leadville, in the county and State aforesaid.

"Together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances.

"To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

"And the St. Louis Smelting and Refining Company, party of the first part, for itself, successors, heirs, executors,

and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents it is well seized of the premises above conveyed, as of good, sure, perfect, absolute and indefeasible estate of inheritance in law, in fee simple, and has good right, full power and lawful authority, to grant, bargain, sell and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of whatever kind or nature soever; and the above bargained premises in quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim, the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof, the said party of the first part has hereunto set its hand and seal the day and year above written, by Charles I. Thompson, its attorney in fact, who is thereunto directed by its duly authorized agent.

[SEAL] THE ST. LOUIS SMELTING AND REFINING CO.,
By CHARLES I. THOMPSON,
Its Attorney in fact.

"Signed, sealed and delivered in presence of

"STATE OF COLORADO, } ss.
Lake County. }

I, Daniel Sayer, a notary public in and for said county, in the State aforesaid, do hereby certify that Charles I. Thompson, the attorney in fact of the St. Louis Smelting and Refining Company, personally known to me to be the person who subscribed the name of the St. Louis Smelting and Refining Company to the annexed deed, appeared before me this day, in person, and acknowledged

that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, and as the free and voluntary act of said St. Louis Smelting and Refining Company, for the uses and purposes therein set forth.

"Given under my hand and notarial seal, this 27th day of March, A. D. 1879.

(Signed) DANIEL SAYER,
[NOTARIAL SEAL] *Notary Public.*"

Upon which deed there appears the following endorsement:

"No. 1875. Warranty deed. The St. Louis Smelting and Refining Company to Frank B. Andrus, Jr.

"STATE OF COLORADO, } ss.
Lake County. }

"I hereby certify that this instrument was filed for record, in my office, at 11 o'clock A. M. April 7, 1879, and is duly recorded in book 13, page No. 286.

(Signed) JOS. H. WELLS,
Recorder."

Plaintiff states that amongst other covenants said deed contains the covenant of quiet possession, whereby defendant company covenants with plaintiff, his heirs and assigns, that he or they shall have the quiet and peaceable possession of said lot and premises as against the whole world, as shown by the copy of said deed set out in full as above.

Plaintiff states that before he purchased said lot and piece of ground the defendant company, by and through its duly elected officers, and duly appointed and authorized agents and attorneys, urged and importuned plaintiff to purchase the same, and plaintiff wholly refused to do so, unless defendant company could deliver to plaintiff the immediate possession of the same. The plaintiff then and there informed the said officers, agents and attorneys

of defendant company that he would not, under any circumstances or at any price, purchase said lot and premises, unless defendant company could and would deliver plaintiff the immediate possession of the same. That at that time the population of the said town of Leadville was increasing very rapidly and rents were very high, and that it was almost impossible to rent a business house in said town at any price, and plaintiff wanted said lot and premises for his own use and occupancy, and for the purpose of carrying on his own business.

That before said plaintiff would agree to buy or purchase said lot and premises, and while negotiations were going on between plaintiff and defendant company for the same, the officers, agents and attorneys of defendant, for and in behalf of said defendant company, falsely, fraudulently, and knowingly, and intentionally represented to plaintiff that defendant company had secured the actual possession of said lot and premises, and that defendant company had obtained a release from all other parties who claimed, or pretended to claim (the actual possession of), the right of the actual possession of said lot and premises, and that defendant company would make and execute to plaintiff a good and sufficient warranty deed, containing all of the usual covenants, together with a covenant of quiet and peaceable possession of said lot and premises, and then and there assured plaintiff that if he would purchase and pay for said lot and premises, and accept such a warranty deed for the same, defendant company could and would deliver to plaintiff the immediate and actual possession of said lot and premises.

That at the time there was a great rush of people to the said town of Leadville, on account of rich mineral discoveries in the immediate neighborhood of said town, and that there was a great struggle to secure the posses-

sion of lots and business houses in the same; and many conflicting titles and claims to the right of possession of houses and lots; and much confusion, riots, and even bloodshed, in regard to possession of lots and houses and lots in said town; and that amid the general confusion and struggle aforesaid, and many contradictory and conflicting claims to the actual possession of lots and houses in said town, plaintiff was wholly unable, after making all the inquiry and using all the diligence within his power, to find out whether the said false and fraudulent statements of defendant company and its officers, agents and attorneys as aforesaid, were true or false, and that plaintiff wholly failed to do so, and plaintiff had no means of finding out or knowing the same, and that there were no records in said county of the lots in said town showing in any manner who were the owners of lots in the same and entitled to the possession of the same, and that plaintiff was compelled to rely wholly upon the said statements and assurances of defendant company as aforesaid, and that plaintiff did wholly rely on such statements and assurances, and at the time believed the same to be true and honest, and made in good faith; and that believing said statements and assurances and relying on the good faith of the said officers, agents and attorneys of defendant company, the said plaintiff purchased said lot and premises, and then and there paid down the money for the same to defendant company, to wit: the sum of $875, and accepted the said warranty deed from defendant company for the same as aforesaid.

That before and at the time plaintiff purchased and paid for said lot and premises, defendant company represented to plaintiff that it had just received a patent from the government of the United States for said lot and premises, as well as for a large number of lots in said town, and that no opposition would be made to its claims

and its right of possession to said lot and premises, and that no trouble whatever of any kind would thereafter occur in regard to either title or the actual possession of said lot and premises; but plaintiff states that all of said statements and assurances on the part of defendant company in regard to its being able to put plaintiff into the immediate, actual possession of said lot and premises, and all of said statements that defendant company had obtained a release from all parties who claimed adverse titles and an adverse right to the actual possession of said lot and premises, and all statements and assurances on the part of defendant company as aforesaid, that it could and would put plaintiff into the immediate possession of said lot and premises, were wholly and absolutely false and fraudulent, and known to be wholly false and fraudulent by defendant and its officers, agents and attorneys, at the time they made the same as aforesaid; and plaintiff states that said false and fraudulent statements were made by C. I. Thompson and A. P. Hereford, who were the duly retained and employed attorneys of defendant company to secure titles to said lot and premises and possession of the same, and to secure title and possession of other lots in said town for defendant, and also, by the president, ——— Harrison, and the vice-president and secretary of defendant company, all of whom were duly authorized to sell said lot and premises, as well as other lots and premises claimed to be owned by defendant company in said town of Leadville; and plaintiff states that said agents, attorneys and officers, for and in behalf of said defendant company, conspired and colluded together to deceive, defraud and wrong and injure plaintiff, by inducing him to pay said company the sum of $875 in money and purchasing said lot and premises aforesaid, knowing at the same time that defendant company could not put plaintiff in possession of the same; and that one

Sarah Ray, whom plaintiff did not at that time know, and had not heard of either the said Sarah Ray or her claim to said lot and premises, and had no means of finding out the same, did claim to be the owner of said lot and premises and entitled to the possession of the same; that all of said agents, attorneys and officers of said company, well knew at the time they induced plaintiff to purchase said lot, that one Sarah Ray claimed to be the owner of and entitled to the possession of said lot and premises; and well knew that defendant company had not obtained a release, or in any manner obtained the right to either the title or possession of the said Sarah Ray to the same; and willfully, fraudulently and falsely, then and there misrepresented to plaintiff that defendant company had obtained a release of all such claims from every one making the same; and plaintiff states that said defendant company, by its said officers, also, willfully and intentionally suppressed and denied the truth of this matter to plaintiff, to mislead and deceive plaintiff into the purchase of said lot and premises as aforesaid, and plaintiff states that he would not have purchased said lot and premises had it not been for such false and fraudulent statements and suppression of the truth as aforesaid.

Plaintiff further states that the more effectually to deceive him, and induce him to purchase said lot and premises, the defendant company, by its agents, officers and attorneys, as aforesaid, offered to put in, and did put in said deed, a covenant of quiet and peaceable possession, when defendant company well knew that it could not comply with the same; and that defendant company falsely and fraudulently offered to put said covenant in said deed, and did put the same in said deed, knowing at the time that the same was a mere sham and fraud; and that the same was put in to defraud and mislead plaintiff and induce him to purchase said lot and premises, and pay for

the same, as aforesaid; and plaintiff states that the putting of said covenant of quiet and peaceable possession and enjoyment, did, in connection with the false and fraudulent statements aforesaid, induce him to purchase said lot and premises.

Plaintiff states that when he had purchased said lot and premises, as above stated, and attempted to take possession of the same, that he found the said Sarah Ray had immediately seized the actual possession of said lot and premises, and was holding the same under an adverse title to defendant company, and claiming the same by virtue of prior possession and occupation on the public domain of the United States, and under a town site right on said public domain; and who wholly refused to give up such right and possession to defendant company or to plaintiff; and plaintiff states that defendant company well knew before and at the time it induced plaintiff to purchase said lot and premises, as aforesaid, that said defendant company could not put plaintiff in possession of said lot and premises; and said company well knew, by and through its agents, officers and attorneys, before and at the time it induced plaintiff to purchase said lot and premises aforesaid, that said Sarah Ray did claim to own said lot and premises; and that the records of said county furnished no evidence of such claim and adverse title, and that plaintiff was wholly and absolutely ignorant of such claim, and had no means of finding out the same; and fraudulently concealed and denied to plaintiff that such claim existed, and assured plaintiff that defendant company had obtained a release of all such claims, no matter by whom held; and well knew that plaintiff would not have purchased said lot and premises had he known of said adverse claim.

That soon after plaintiff had been induced as aforesaid to make said purchase, the defendant company com-

menced a suit in ejectment against the said Sarah Ray to recover possession of said lot and premises, but did not succeed in ejecting the said Sarah Ray and her tenants from the possession of said lot and premises until the 22d day of February, A. D. 1883; and plaintiff was kept out of possession of said lot and premises all the time from the 27th day of March, A. D. 1879, the date of his said purchase and deed above set out, till the 22d day of February, A. D. 1883. That the price or value of said lot and premises increased rapidly (and) immediately after plaintiff purchased the same; and that said lot and premises rented for and was worth $400 per month rental during all of said time, and that plaintiff was kept out of the same; and the aggregate rental value of the same, during that time, was eighteen (18) thousand seven hundred and thirty-three (18733) dollars, all of which plaintiff lost by the fraud and deceit practiced upon him by defendant company as aforesaid, together with the interest on the same up to this time.

Plaintiff states that he has been injured and damaged in the sum of twenty thousand (20,000) dollars by the wrong, fraud and deceit of defendant company as aforesaid.

Plaintiff states that the amount involved in this action, exclusive of costs of suit, is for over the sum of five hundred dollars.

Plaintiff therefore asks judgment against defendant company for the sum of twenty thousand dollars and costs of suit, and such other relief as may be legal and just.

(Signed) T. A. GREEN,
Attorney for Plaintiff.

DEMURRER.

Now comes the said defendant, The St. Louis Smelting and Refining Company, by Chas. E. Gast, its attorney, and demurs to the complaint herein, because:

1. Said complaint does not set forth facts sufficient to constitute a cause of action.

2. Several pretended causes of action have been improperly united therein, to wit:

(*a*) A pretended cause of action for breach of a parol contract to put the plaintiff in possession of the land described.

(*b*) For breach of the covenant of quiet enjoyment contained in the plaintiff's deed.

(*c*) For deceit.

And these several causes of action have been improperly blended in one statement.

3. That the complaint is ambiguous, unintelligible and uncertain in this, that it does not appear how the plaintiff was misled or deceived by the pretended representations stated in the said complaint.

(Signed) CHAS. E. GAST,

Attorney for Defendant, The St. Louis Smelting and Refining Company, Pueblo, Colorado.

IN THE

SUPREME COURT

OF THE

United States of America.

OCTOBER TERM, A. D. 1885.

FRANK B. ANDRUS,

vs.

THE ST. LOUIS SMELTING AND REFINING COMPANY.

Brief and Argument of T. A. Green, Attorney for Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action on the case at common law, but commenced under the Code of Colorado, in the United States Circuit Court for the District of that State. The action is for fraud and deceit, in connection with the sale and conveyance of certain real estate in the city of Leadville, and

State of Colorado, by the defendant in error to the plaintiff in error.

The Court below sustained the demurrer to the complaint on the ground that the complaint does not contain facts sufficient to constitute a cause of action, and on the ground that no amount of fraud and deceit in connection with the sale of real estate, can constitute a good cause of action in law. The plaintiff, in the Court below, stood by his complaint, and judgment went for the defendant, and the plaintiff below brings up the case in this Court on writ of error.

I have printed the complaint and demurrer in full, in connection with my brief and argument, as the complaint contains the most concise statement of the facts upon which the action is founded that I can possibly make; and as the demurrer admits all of the material facts, it only remains for this Court to apply the law to these facts. I refer the Court to the record herewith printed for the facts, and shall at once proceed to the discussion of the law applicable to such a state of facts.

I shall take up and consider the whole case under the first assignment of error, as the entire merits of the case are presented under that assignment; but as a matter of precaution I shall briefly consider all the assignments of error *seriatim*.

I. ERROR.

The Court below erred in sustaining the defendant's demurrer to the plaintiff's complaint. The above assignment of error presents the whole case and all the legal questions raised by the record.

The Court below did not sustain the demurrer to the complaint because it did not allege facts sufficient to show that a gross fraud had been practiced upon plaintiff by defendant company; but, upon the ground that no matter how much fraud and deceit had been so practiced, no

action in law could be maintained for the same. In the light of the long line of authorities upon this point, and the further fact that there never has been any conflict of authorities in regard to it, in either England or America, it seems to me that this was a most remarkable ruling, and would allow all the frauds and deception that men might possibly practice in that regard wholly without remedy, no matter how great the injury or damage, and set at naught that grand old maxim of the law, that there is no wrong without a remedy, and that, too, in regard to a very large and most important branch of business transactions, and wrongs against which all persons should be protected by the law. Fraud has always been held to be odious, and both law and equity spew it out of their mouths, and will not at all tolerate it anywhere; and it utterly dissolves and destroys the binding obligations of the most solemn contracts and human transactions, and even the solemnity of judgments of our highest Courts is swept away and such judgments blotted out, whenever tainted with fraud. Why, then, should such aggravated cases as the one at bar be an exception?

POINTS.

1. Fraud and deceit, whenever connected with any kind of human contracts or transactions in regard to either goods, chattels, or real estate, or any interest at all connected with real estate, or the buying or selling of the same, when accompanied with damage, is a good cause of action.

2 Vol. Hilliard on Torts, p. 137.
Upton vs. Vail, 6 Johns., pp. 181, 182.
Barney vs. Dervey, 13 Johns., 225.
Morgan vs. Bliss, 2 Mass., 111.
Farras vs. Alston, 1 Dev., 69.
——— vs. Gray, 11 Vt., 615.
Jones vs. Emery, 40 N. H., 348.

2. The above doctrine applies to sales of real estate, as well as to sales of goods and chattels, and to the inserting of false and fraudulent covenants of warranty in deeds for the conveyance of real estate, as well as for false and fraudulent warranties in sales of goods and chattels.

Rawle on Covenants, 64, 65.

"An action for fraud and deceit lies, notwithstanding an express warranty."

Same authority.

The case of Monell & Weller vs. Colden, 13 Johns., 396—top page 395, is just in point in the case at bar; and it seems to me settles this whole case, and especially so as there are no authorities in conflict with it; but an overwhelmning drift of authorities in its support. Also—

13 Johns., 226.
Clark vs. Baird, 5 Seld., 183.
Phillips vs. Bush, 15 Iowa, 64.

Also—

Johnson vs. McDaniel, 15 Ark., 109.
Fowler vs. Abrams, 3 E. D. Smith, 1.
Cravans vs. Grant, 4 Monr., 176.

3. When either a written or verbal warranty is made touching goods and chattels, and the warrantor knows at the time he makes such warranty that the same is false, it then becomes what is known in law as a *fraudulent warranty*, and upon such a warranty the injured party may either bring an action of assumpsit for a breach of the contract of warranty, or he may bring his action on the case for fraudulent deceit, and recover in tort: and he is entitled to the double aspect of his case, and especially under our system of Code pleading.

Huston vs. Plato, 3 Colorado, 402-3-4.

The Salem India Rubber Co. vs. Adams, 23 Pick.. 266.

Norton vs. Doherty, 3 Gray. 372.

Ruff vs. Jarrett, 94 Ill., 475.

4. The complaint, in the case at bar, alleges, and the demurrer admits, that defendant in error, through its officers and agents, knowingly and intentionally and for the purpose of deceiving the plaintiff in error, not only made the false and fraudulent statements alleged, but also, falsely and fraudulently inserted the covenant of quiet enjoyment in the deed, knowing at the same time that the defendant in error could not perform the same; that defendant in error was out of possession of the property at that time, and could not obtain it except at the end of a long and bitter law suit; and that said covenant was inserted for the purpose of deceiving and misleading plaintiff in error, and to induce him to purchase said property. Now, passing over all of the other false and fraudulent statements and assurances to induce plaintiff in error to purchase, was not the insertion of the false and fraudulent covenant in the deed a good cause of action for fraud and deceit? What is a covenant of this nature in a deed for the conveyance of land, but a written warranty? Why should not the same law be applied to a fraudulent warranty of this kind, as is applied to a fraudulent warranty in regard to the sale of goods and chattels? It is true, that in an ordinary action of covenant for a breach of a covenant in a deed for the conveyance of land, the purchase money, with interest, is the measure of damages; but it is laid down in all the books that touch upon the subject, that when there has been actual fraud and deceit practiced by the vendor, that the injured party may recover the full amount of damage he may have sustained—the full value of his contract; but the rules of damages in regard to actions sounding in tort for fraud and deceit, are

not at all technical—cannot be; and I maintain that it makes no difference in the case at bar, whether a technical action of covenant would lie or not, so long as the title did not fail entirely. I shall not attempt to discuss this question, because I hold that an action for fraud and deceit may grow out of this transaction wholly independent of the question as to whether or not there was a technical breach of the covenant for quiet enjoyment, and whether an action of covenant will lie for such breach or not. "A promise—a contract—and a tort, may be *coincident*, giving to the party, without reference to the accompanying contract as such, a remedy for the simple wrong occasioned by a breach of the promise. And in an action for such tort (as in case of *deceit*), it is not requisite to set forth the contract, or any consideration, *but simply the fraudulent deceit and damages.*" The breach of a contract may be a wrong in respect of which the party injured may sue in case instead of suing upon the contract.

1 Vol. Hilliard on Torts, pp. 3–4, Sec. 3.

5. "Upon this principle, if a vendor, during the negotiations for the sale, make a fraudulent representation in relation to a material fact, and *one on which the vendee has a right to rely*, and the latter is thereby misled to his prejudice, the vendor is responsible in damages."

Pritchett vs. Munroe, 22 Ala., 501.
Howard vs. Gould, 2 Williams, 524.
1 Vol. Hilliard on Torts, p. 4, Sec. 4.

An action of deceit will lie, notwithstanding an express warranty.

Cravens vs. Grant, 4 Monr., 126.

"Upon the same grounds, an action will lie against the seller of an interest in an estate, for affirming the rents

to be more than they are, while he is in treaty and prior to the sale, if the vendee relies upon such affirmation, although the seller was not in possession."

Lysney vs. Selby, 2 Ld. Raym., 1118.
1 Vol. Hilliard on Torts, p. 5, Sec. 4.

6. A vendor of real estate is liable for false and fraudulent representations in regard to quantity, and for false representations as to certain privileges attached to the land, and for selling land which does not exist, or an interest in land which he does not possess, when the vendee has a right to rely on such false and fraudulent statements, and does rely on the same.

Clark vs. Baird, 5 Seld., 183.
Harlow vs. Green, 34 Vt., 379.
Morrill vs. Colden, 13 Johns., 395.
Wardell vs. Fosdick, 13 Johns., 325.
1 Vol. Hilliard on Torts, p. 5, Sec. 4.

7. But an action will not lie for fraudulent misrepresentations as to the land included in the boundaries of the deed, nor for misrepresentations as to value or future profits; but this doctrine does not touch the case at bar, as a vendee must find out these matters for himself, which he can always do by exercising due diligence, and he has no right to rely upon such representations; and hence no cause of action if he does so.

A purchaser must exercise due diligence when the means of information are within his reach.

1 Vol. Hillard on Torts, p. 16, Secs. 11 and 12.

The allegations of the complaint in the case at bar, show that plaintiff in error did exercise all the diligence within his power, and use all means of information within his reach, and that it was impossible, under the peculiar

circumstances, for him to find out about the actual possession of the property; and that the false and fraudulent statements and assurances of defendant in error, that defendant company and defendant in error had obtained releases from all parties claiming a right to said property, and the agreement to put the false and fraudulent covenant of quiet possession in the deed, take this case entirely out of the doctrine that a purchaser must exercise due diligence, and use all means of information within his reach before he can complain. A false representation, although made through ignorance, in regard to real property, avoids a sale.

1 Vol. Hilliard on Torts, p. 14.

8. But in order to recover for fraud and deceit in the sale of property, it is not necessary that the purchaser should restore the property, but he may retain it and recover the damages growing out of the fraud and deceit.

1 Bradwell, Ill. Ap. R., 177.
1 Vol. Chitty on Contracts, p. 649.
Osborn vs. Fuller, 14 Conn., 529.
Vincent vs. Leland, 100 Mass., 432.
10 Cush., 88.
12 Wend., 413.
18 Wend., 425.
4 Kernan, 602.
11 Ala., 732.
1 Md. Ch. R., 496.
10 Ala., 255.
3 Rawle, 23.
2 Smith's L. C., 25–26.

9. In an action for deceit, growing out of a contract, where the deceit is the *gravamen* of the action, the Court

is not authorized to instruct upon any point involving the performance of the contract out of which the deceit had its origin.

Earms vs. Morgan, 37 Ill., 260.

10. Where the *gravamen* of the action is *deceit* and *warranty*, the amount of the damages recovered is not the amount paid for the property, but the actual loss sustained by reason of the deceit, and may be more or less than the amount paid.

Applebee vs. Rumey, 28 Ill., 280.

11. Corporations are responsible for the fraud and deceit and torts of their duly authorized officers and agents, when acting in pursuance of their powers and duties as such officers and agents. This doctrine is too familiar to require a reference to authorities, but I will refer to a single authority on this point.

2 Vol. Hilliard on Torts, pp. 322, 324–327.

II. ERROR.

The Court below erred in not overruling defendant's demurrer to plaintiff's complaint.

This assignment of error is met by the same authorities and arguments as the first.

III. ERROR.

The Court below erred in giving judgment for defendant on said demurrer.

This assignment of error is met in the same manner.

IV. ERROR.

The Court below erred in not giving judgment for plaintiff on said demurrer.

All of the above assignments of error raise substantially

the same question; but inasmuch as I wish to rely on all of them, I offer the following additional points and authorities.

12. "An action upon the case, for fraud and deceit, will lie for false representations made by the defendant by words and actions, *with intent to deceive the plaintiff*, whereby the plaintiff sustained damage; and this, although the defendant had no interest in making such representations."

Hart vs. Tallmadge, 2 Day (Conn.), 382.
Ives vs. Carter, 24 Conn., 392.
Green vs. Bryant, 2 Ga., 66.
McAleer vs. McMurray, 58 Pa. St., 126.
Hubbard vs. Briggs, 31 N. Y., 518.
Fleming vs. Slocum, 18 Johns., 403.
Sheaffer vs. Slead. 7 Blackf. (Md.), 178.
State Bank vs. Hamilton, 2 Ind., 457.
Oldham vs. Bentley, 6 B. Mon. (Ky.), 428.
Benton vs. Pratt, 2 Wend., 385.
Weatherford vs. Fishback, 4 Ill. (3 Scam.), 170.
Nowlan vs. Cain, 3 Allen (Mass.), 261.

"Both fraud and consequent damage must appear to entitle the plaintiff to recover in action for deceit."

Freeman vs. McDaniel, 23 Ga., 83.
Upton vs. Vail, 6 Johns., 181.
Nye vs. Merrium, 35 Vt., 438.
Hanson vs. Edgerly, 29 N. H. (9 Fost.), 343.

This is all that is necessary to constitute a good cause of action, no matter what kind of a contract or business transaction it may grow out of, and the sale of real estate is no exception.

"In all cases of *fraud* and damage resulting immediately therefrom, an action lies at the suit of the party injured."

Allison vs. Tyson, 5 Hump. (Tenn.), 449.

An action will lie for fraud and deceit in the sale of land.

Wade vs. Shurman, 2 Bibb. (Ky.), 583.

13. "To the rule of law that the entire agreement of the parties is presumed to have been incorporated in their deed or written contract; and that if the purchaser has failed to provide for his own security by appropriate covenants, he is remediless, *fraud constitutes an exception.*"

Gwinther vs. Gerding, 3 Head, (Tenn.), 397.

Suppose a purchaser attempts to protect himself by *appropriate covenants;* and a *gross* and *aggravated* fraud is perpetrated upon him in regard to such covenants, and that he is greatly damaged thereby, why should he not maintain an action for fraud and deceit? If not, why not? If a vendor knowingly and intentionally, and for the purpose of deceiving and misleading a purchaser, inserts what he knows to be false and fraudulent covenants in a deed, and the purchaser is thereby deceived, misled and greatly wronged, injured and damaged, as in the present case, why should the law deny the injured party a remedy?

Such a fraud, however, is but a small part of the fraud and deceit complained of in the case at bar. When a vendor of real property never had the actual possession of such property, and knows that it is in the adverse possession of other parties claiming under color of title, and that he cannot obtain possession of it for years to come, if ever, and knows that the purchaser must be kept out of such possession until after the termination of a long and bitter litigation, and when the purchaser refuses to take the property unless he can obtain immediate possession of the same; and the seller by false and fraudulent representations and assurances, as well as by inserting a false and fraudulent covenant of quiet enjoyment in the deed,

induces the purchaser to take the property, after the purchaser has used due diligence to find out all the facts, and is compelled to rely on such false and fraudulent statements and fraudulent covenants, ought not such a state of facts be considered an immediate breach of such covenant or covenants, and ought not the injured party be entitled to maintain either an action of covenant, or an action for fraud and deceit? Why not? I think it has been held by some high authorities that where a vendor makes such a covenant and has not the possession and cannot deliver possession, it is equivalent to a breach of the covenant of quiet enjoyment; but I do not think these nice technical questions have anything to do with the case at bar, and I only mention them as throwing some light upon it.

"When a grantee in a deed containing a covenant of general warranty *has taken possession*, he cannot maintain an action for a breach of such covenant until evicted by legal proceedings," etc.

Owen vs. Thomas, 33 Ill., 320.

But how about this matter when the grantee is kept out of possession; and suppose the grantor has never been in possession, and cannot deliver the possession, and the grantee cannot obtain the possession for five, ten or twenty years, and has been induced by the vendor to purchase by fraudulent statements, and the insertion of a fraudulent covenant in regard to quiet possession, is there no remedy in such case?

Russell vs. Clark, 7 Cranch, 69.
Suydam vs. Watts, 4 McLean, 162.
Grant vs. Boutly, 2 Cranch, C. Ct., 184.
Fennick vs. Grimes, 5 Cranch, 603.

"A representation of the value of land is a mere ex-

pression of opinion, for which an action for fraud cannot be maintained."

2 E. D. Smith (N. Y.), 424.

The above is one of the exceptions in regard to false representations as to the sale of lands, where an action cannot be maintained; and I have ennumerated all the exceptions of this kind above, and the reasons on which the same are founded, but they are exceptions founded on good reasons, and have no application to the case at bar at all. The other exceptions are where the means of knowledge are equally within the reach of both parties, and where the purchaser fails to use due diligence to ascertain all the facts for himself; but I find no other exceptions in the books, and none of these can possibly apply to the case at bar. These exceptional cases throw light on the whole doctrine, and are mentioned for that purpose.

14. "An action of deceit lies as well where there is an express warranty as where there is not."

Cravens vs. Grant, 4 L. B. Mon. (Ky.), 126.

"And although there was a warranty, if fraud be shown the plaintiff can recover."

Cravens vs. Grant, 2 L. B. Mon. (Ky.), 117.

15. The covenant of quiet enjoyment *goes to the possession*, and not to the title; and is broken only by an entry or expulsion from, or *some actual disturbance in the possession*."

3 Johns., 471.
2 Hill, 105.
3 Duer, 464.
2 Jones (N. C.) L., 203.
7 Wend., 281.
5 Johns., 120.
15 Johns., 483.

"A general covenant of warranty of title is not a covenant of seizen, but is equivalent to a covenant of quiet enjoyment."

Caldwell vs. Kirkpatrick, 6 Ala., 60.

There are, however, several substantial distinctions between these two covenants, which it is not necessary to point out here, but they are both very important covenants, and a gross and aggravated fraud in regard to either in an important real estate transaction, is a very serious wrong and injury, for which an action for fraud and deceit should lie, and especially as an action of covenant is a very technical remedy, and attended with many difficulties and hardships very often to the purchaser of real estate.

As a general rule, actions of covenants for breaches of these two covenants, do not lie unless there has been an eviction by process of law, or unless there are outstanding paramount titles; but these are important exceptions to this rule; but it often happens, even where there has been no fraud or deceit, that great wrong and injustice are suffered on account of the extreme narrowness and technical nature of the remedy for a breach of these important covenants, and in many cases that remedy is little less than a mockery of justice.

SUGGESTIONS.

It may surprise the Court that the amount of damages alleged for one lot is $20,000, but the actual amount of rent realized from the property in question during the time plaintiff was wrongfully kept out of possession, was over $18,000, and interest added will amount to over $20,000 by the time the case can now be tried, should the judgment of the Court below be reversed.

At that time Leadville was a phenomenal town, so far

as rents and the almost fabulous increase in the value of property were concerned. The demurerr, however, admits all the facts alleged in the complaint for the purposes of this action, and I only make these suggestions to show the importance of the case and the large amount of money the plaintiff in error must lose, without remedy, if this high tribunal shall sustain the rulings of the Court below. Would it not be a sad reflection on our boasted system of jurisprudence if it can offer no remedy for such gross and aggravated wrongs, on account of some nice technicalities in regard to the doctrine of covenants? But I must confess that I am wholly unable to see any distinction in regard to an action for fraud and deceit growing out of a sale and conveyance of real estate, and an action for fraud and deceit, growing out of any other kind of contract or business transaction.

In Rawle on Covenants, page 64, the following doctrine is laid down, to wit:

"It may be remarked that although the cases which have been referred to are based on an absence of fraud on the part of the vendor, yet it seems to be at least doubtful whether, in an action upon the covenant, fraud can be taken advantage of by the purchaser to increase his damages. Although it was remarked in Pitcher vs. Livingston, that if any imposition is practiced by the grantor by the fraudulent suppression of truth, or suggestion of falsehood in relation to his title, the grantee *may have an action on the case in the nature of a writ of deceit, and in such action he may recover to the full extent of his loss*, and although it was also said in Bender vs. Fromberger, that if the seller *makes use of any fraud, concealment or artifice to mislead the purchaser in examining the title, the case is different, he will be answerable for all losses which may ensue*, yet it would be difficult to conceive how, *in an action on the covenant*, the jury would be allowed to increase the dam-

age beyond the extent of the consideration money, *as the distinction between such an action and one in the nature of a writ of deceit, is an obvious one.*"

Thus, there seems to be no doubt or question anywhere that an action for fraud and deceit will lie in all such cases, and that the measure of damage is the entire loss growing out of such fraud and deceit, and why does not the case at bar come clearly with this law? One can hardly conceive of a stronger case of fraud and deceit than that alleged in the complaint in this case, and admitted by the demurrer to the same, and it seems to me it cannot be possible that the law affords no remedy at all for so great a wrong. Certainly, before our Courts should deny all remedy for such aggravated wrongs, they should offer very grave and weighty reasons for doing so, and I cannot believe that any such reasons exist or can be offered by any Court or human tribunal, however high or august it may be!

T. A. GREEN,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

FRANK B. ANDRUS,
vs. *Plaintiff in Error,*
THE ST. LOUIS SMELTING AND REFINING COMPANY,
Defendant in Error.

CHAS. E. GAST,
Att'y for Defendant in Error.

CHIEFTAIN PRINT.

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Defendant in Error.

The record of this cause consists of a complaint and demurrer thereto. The demurrer was sustained by the lower court, and the plaintiff electing to stand by the complaint, judgment was entered for the defendant.

Opposite counsel states that the demurrer was sustained "because the complaint did not allege facts suffi-

cient to constitute a good cause of action, and on the ground that no amount of fraud and deceit in connection with the sale of real estate can constitute a good cause of action in law."

This is a bald, unwarranted assumption, which this Court will not accept on his statement, in the absence of anything in the record supporting it.

The grounds of demurrer were:

1. That no good cause of action is stated.

2. That several pretended causes of action are improperly united and blended confusedly in one statement.

(*a.*) For breach of parol contract to deliver the possession to plaintiff.

(*b.*) For breach of the covenant of quiet enjoyment contained in his deed.

(*c.*) For deceit.

3. That the complaint is ambiguous, unintelligible and uncertain in this, that it does not appear how the plaintiff was misled or deceived by the pretended representations.

No opinion was filed, and no statement of reasons appears in the record as to *why* the demurrer was sustained. This Court can have no light on that subject, except what is afforded by the usual record entry in sustaining a demurrer, that "the complaint is not sufficient in law wherewith to maintain the action." The ruling might have been based upon *any one* of the grounds stated, and as no leave of amendment was asked (the plaintiff's attorney saying that he would stand by his pleading, the equivalent of saying that to him it appeared sufficient both in form and substance) final judgment was necessarily entered for the defendant.

Therefore, if the pleading is obnoxious to a demurrer in any one of the respects indicated, there was no error in the judgment and it must be affirmed.

If the complaint is examined, it will be found to transgress all rules of good orderly pleading. We will discuss it from this standpoint, before saying anything about the main substantial proposition that it fails to state a cause of action. It is certainly important in the administration of justice that pleadings should be framed with due regard to well known rules, so that the issues mutually tendered and accepted may be well defined. Confused and disorderly pleading induces other evils in the trial of causes, and ought at all times to be discouraged.

Now, a reading of the complaint shows that it was intended to count upon three distinct causes of action. *First*, a parol contract, outside of the covenants in the deed, made antecedent or contemporaneous therewith, to deliver actual possession of the property in controversy to the plaintiff. *Second*, a breach of the covenant of quiet enjoyment. *Third*, an action sounding in tort for deceitful representations. As all intendments must be taken most strongly against the pleader, it is impossible to say that he intended to rely upon one of these causes of action and state the others as inducement, even if that were permissible. They are all categorically stated, and each as prominently as the others.

It is probably true under the the peculiar provisions of the Colorado Code that these several causes of action may be united, *but there must be a separate statement of each.* This is expressly required by the statute; and it not only contravenes the statute, but the canons of good pleading under any system, to blend them all to-

gether in a single confused statement of the plaintiff's demand.

Civil Code of Colorado, 1877, Sec. 71.

Bliss on Code Pleading, Sec. 119.

In fact, the entire complaint is pervaded with ambiguity and uncertainty. It is unintelligible to the last degree. For instance, how could plaintiff have been deceived, or rather what right had he to be deceived by the representation of the officers of the defendant company that it had the actual possession of the lot of ground, a fact which was open to observation, and which he could verify as well as any one else? Why, as he claims, was he compelled to rely upon the statement and assurances of the defendant? Judging by the state of things that existed at Leadville at that time, as narrated in the complaint, "lot jumping" was the principal occupation of many of its inhabitants. No one's property was safe unless protected by a shot gun. An assurance that there was no adverse possession of a lot, true to-day, might be false to-morrow. Amid such struggle and confusion, what right had he to rely upon a representation that *he* would encounter no trouble himself in regard to the possession? These assurances seem to have been antecedent to his purchase and the execution of the deed. Was Sarah Ray at that time asserting *in good faith* a right of possession? Was she then in *actual* possession? If so, what is the meaning of the complaint, where it is alleged that "when plaintiff had purchased said lot and premises, and attempted to take possession, he found *the said Sarah Ray had immediately seized the actual possession of said lot.*" Again, how can it be said that the insertion of a covenant of quiet and peaceable possession in the deed operated as a fraud upon the plaintiff? These are

but a few of the many vague, unintelligible, and unmeaning averments constituting the complaint. It is difficult to see how a clear, well defined issue could have been taken upon it.

In the argument of the cause in this Court, however, opposite counsel say that the gravamen of the suit is deceit, and that only. No right of recovery is asserted, predicated upon the breach of any parol agreement to deliver immediate actual possession, or upon a breach of any covenant written in the deed. He rests the case upon the charge that the plaintiff was induced to buy the property by false and fraudulent representations, upon which he relied and had a right to rely. An argument from that standpoint, then, goes entirely to the merits of the cause of action.

This deceit, according to the argument, consisted, *first*, in *knowingly* making a *false* covenant; or in other words writing in the conveyance a covenant of quiet and peaceable possession with knowledge that there was an adverse possession which would effect a breach; and *second*, positive statements respecting the title, namely, that there was no adverse possession, and that plaintiff would have no difficulty in obtaining the possession, upon which statements he depended in making the purchase.

As to the covenant: if no action could be maintained *on the covenant itself, a fortiori* none can be for falsely inserting it in the deed. Now for aught that appears, plaintiff received a perfect fee simple title; Sarah Ray was a bare trespasser, a "squatter," without any right whatever; the lawful title was asserted against her, and in due course, upon legal proceedings, she was ejected. These facts negative the idea that there was any breach of the covenant.

In *Rawle on Covenants of Title*, page 163, it is said that "the covenant for quiet enjoyment has been defined to be an assurance against disturbance consequent upon a defective title."

Boone on Real Property sec. 314, treating of the covenant of quiet enjoyment, says: "In order to establish a breach of the covenant a lawful eviction in some form, either actual or constructive, must be shown."

In 2nd *Washburne on Real Property*, page 715, it is said: "As the covenant of warranty in American deeds answers in most respects, as has been observed, to the covenant for quiet enjoyment, it has been uniformly held that in order to constitute a breach of such covenant there must be something tantamount to an eviction of the tenant by some one having a better legal title. No act of a mere stranger, though under pretense of title which is not a valid one, will operate as a breach of this covenant.

In *Rawle on Covenants*, page 165, it is said: "Although the words of the covenant may purport to indemnify the purchaser from any interruption on the part of the grantor, or any other person, yet this must be understood to mean such interruption only as may take place under paramount title."

These, and many more authorities that might be cited, show that the covenant of quiet enjoyment is practically synonymous with that of warranty, and cannot be broken unless by the existence of a superior title.

There is no distinction between cases where there is an adverse possession, however tortious, at the date of the deed, and disturbances arising after the execution of the deed and the grantee going into possession.

In *Gardner v. Ketcltas*, 3 *Hill*, page 330, a lease was construed as imparting a covenant of quiet enjoy-

ment. There was an adverse possession at the date of lease by a former tenant whose right had expired. The plaintiff was delayed in getting possession. The Court say: "All that the covenant exacts of the lessor is that he shall have such a title to the premises, at the time, as shall enable him to give a free, unincumbered lease for the term demised. There is no warranty express or implied against the acts of strangers; hence, if the lessee be ousted by one who has no title, the law leaves him to his remedy against the wrong-doer, and will not judge that the lessor covenanted against the wrongful acts of strangers unless the covenant be full and express to the purpose:

Noke's Case, 4 Rep. 80.
Dudley v. Folliot, 3 T. R. 584.
Hayes v. Bickerstaff, Vaugh. 118.
Platt on Cov. 314, and the cases there cited.

I admit, the covenant of quiet enjoyment means to insure to the lessee a legal right to enter and enjoy the premises, and if he is prevented from entering into the possession by a person already in, under a paramount title, the action may be sustained. That was decided in *Ludwell vs. Newman*, 6 T. R. 458. In such a case, no ouster or expulsion is necessary on which to predicate a suit, as the lessee is not bound to enter and commit a trespass:

Holder v. Taylor, Hob. 12.
1 *Saund.* 322.
Platt on Cov., 327.
Grannis v. Clark, 8 Cow. 36.
And see 25 *Wend.* 446.

But if the party holding is a wrong-doer, the remedy of the lessee is as perfect and effectual to dispossess him

after, as that of the lessor was before the execution of the lease."

The case of *Beebe v. Swartwout*, 3 *Gillman*, 162, contains a very full discussion of this subject. It was a suit to foreclose a mortgage in which the defense was that the mortgage was given for purchase money of property bought with a covenant that the grantors would warrant and defend the premises in the quiet and peaceable possession of the grantee, his heirs and assigns, against themselves, their heirs, and against all and every person or persons whomsoever, lawfully claiming and to claim the same. The warranty was precisely the same as in the case at bar. At the date of the purchase there was an adverse possession of part of the land under another and different title. The Court holds, reviewing all the authorities on the subject, English and American, that the mere possession of a stranger, although he claim title and right of possession, does not amount to a breach of the covenant for quiet enjoyment. The title must be lawful and a better one.

Spear v. Allison, 20 Pa. St., 200, is to the same effect.

It is doubtless true that an action of deceit will lie in transactions pertaining to the sale of real estate, where, for instance, misrepresentations have been made by the vendor respecting the location, quantity, quality, or condition of the land, the privileges connected with it, or the rents and profits derived therefrom. But this is not true *where the alleged misrepresentations, as in this case, go merely to the question of title and right of possession.* As to these matters, all previous representations are merged in the deed itself, and by it the rights and liabilities of the parties must be determined.

In *Peabody v. Phelps*, 9 Cal., 213, the cases on this subject are carefully reviewed by Justice Field, and this conclusion reached both upon authority and as a matter of sound policy.

Now, if the false representations of the officers of the defendant company respecting this property are analyzed, it will be found that under this and other rules, applicable to cases of fraud, there is nothing upon which an action can be founded. To say that there was no adverse *right* of possession was to affirm the soundness of the title merely and to speak the truth. To say that there was no adverse possession *in fact* was something as to the truth of which the plaintiff could have satisfied himself by inspecting the ground, and upon which he had no right to rely. Besides, it is not clear from the pleading that Sarah Ray had "jumped" the property when these statements were made. To say that no difficulty *would be met with* in taking possession was to speak conjecturally of future events, and about a matter where the expression of any opinion in the then condition of Leadville, would be hazardous. Certainly, with the struggle, confusion and bloodshed over titles and possessory rights then prevailing at Leadville, it would seem that every purchaser of property assumed some chances. Of this he could not fail to be apprised in advance, and in the very nature of things, the alleged representations could not by any reasonable person be regarded otherwise than vague, indefinite and conjectural, in their nature and terms, and though untrue, they go for nothing as establishing fraud.

Respectfully submitted,

CHAS. E. GAST,

Att'y for Deft. in Error.